NORLELA MOHAMAD HABIBULLAH *a*

v.

YUSUF MALDONER

HIGH COURT MALAYA, KUALA LUMPUR *b*
FAIZA TAMBY CHIK J
[ORIGINATING SUMMONS NO: S8-24-3587-2002]
20 NOVEMBER 2003

CIVIL PROCEDURE: *Jurisdiction - Custody order - Jurisdiction of civil court to grant custody order as parties were Muslims - Whether syariah court appropriate forum - Marriage contracted and solemnised abroad but not registered in Malaysia - Whether syariah court had no jurisdiction in view of non-registration thereof - Islamic Family Law (Selangor) En. 4/1984, ss. 4, 24, 31(1),(2) - Federal Constitution, art. 121(1A)* *c*

FAMILY LAW: *Children - Custody order - Jurisdiction of civil court to grant custody order as parties were Muslims - Whether syariah court appropriate forum - Marriage contracted and solemnised abroad but not registered in Malaysia - Whether syariah court had no jurisdiction in view of non-registration thereof - Islamic Family Law (Selangor) En. 4/1984, ss. 4, 24, 31(1),(2) - Federal Constitution, art. 121(1A)* *d* *e*

CONSTITUTIONAL LAW: *Jurisdiction - Custody order - Jurisdiction of civil court to grant custody order as parties were Muslims - Whether syariah court appropriate forum - Marriage contracted and solemnised abroad but not registered in Malaysia - Whether syariah court had no jurisdiction in view of non-registration thereof - Islamic Family Law (Selangor) En. 4/1984, ss. 4, 24, 31(1),(2) - Federal Constitution, art. 121(1A)* *f*

This was an application by the respondent, a foreigner, to set aside the custody order ('the order') obtained by the applicant, a Malaysian, of their child. The marriage between the respondent and applicant was allegedly registered at an Islamic Centre in Switzerland and subsequently went through a civil registration in Austria. The marriage lasted only three months and was thereafter dissolved by a civil court in Austria. The respondent raised the issue that the High Court had no jurisdiction to grant the order as both he and the applicant professed the religion of Islam. *g* *h*

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Held (dismissing the application):

[1] Article 121(1A) of the Federal Constitution does not overrule the general jurisdiction of the civil courts. Civil courts are courts of general jurisdiction and can hear cases commenced by Muslims and non-Muslims, and can try offences against Muslims and non-Muslims that are created by the laws of the land. Further, the civil High Courts are courts of inherent jurisdiction whilst the jurisdiction of the syariah courts are determined by the respective state laws. If the legislature does not confer on the syariah courts any jurisdiction to deal with any matter in the state list then the syariah court is precluded from dealing with that matter. In the present case, as the said order was issued by a court of competent jurisdiction, it was valid until and unless it was set aside. (pp 546 g-h & 547 a)

[2] The marriage between the applicant and the respondent was never registered in Malaysia as the parties had no intention of setting up home in Malaysia. They had intended to set up home in Austria. Clearly, the parties had no intention of submitting themselves or their marriage to the jurisdiction of the Malaysian syariah courts. It followed that s. 24 of the Islamic Family Law (Selangor) Enactment 4/1984 ('the Enactment') which provides for the solemnisation of marriage in Malaysian Embassies, High Commission or Consulate abroad, had no application herein. Further, the parties did not register their marriage within six months after the date of their marriage pursuant to s. 31(1) of the Enactment. Neither did the parties pursuant to s. 31(2) of the Enactment register their marriage when they arrived in Malaysia during the first month of their marriage. The respondent, having gone through a divorce in Austria, was estopped from applying to have the marriage registered with the syariah jurisdiction in Malaysia. (pp 547 b-h & 548 a-f)

[3] Section 4 of the Enactment clearly states that the Enactment shall apply to all Muslims living in the state of Selangor and to all Muslims resident in the state of Selangor who are living outside the state of Selangor. Section 4 had no application to the respondent as he was not living in Selangor. Neither was he resident in the state of Selangor living outside the state of Selangor. It was therefore clear that the respondent had no locus under the Enactment. (p 549 a-c)

[4] No proof was put forward by the respondent as to the existence of the registrar of Muslim Marriages Divorce and Ruju at the Islamic Centre St. Gallen in Switzerland wherein the marriage was allegedly registered. Therefore, the registration, if any, of the marriage at the said Centre could not be taken into consideration and deemed registered under the Enactment. The requirement of a Registrar of Muslim marriage was not met. That the marriage was deemed registered under the Enactment by virtue of the civil registration of the marriage in Austria could also not be considered as then the applicant's submission that the civil High Court of Malaysia had jurisdiction to hear the matter should stand. (pp 549 g-h & 550 a-c)

[5] There was no specific section that the applicant could resort to in the Enactment to get the return of her child. The respondent had taken the said child out of Malaysia. The issue was not merely one of custody or guardianship but one that hinged on criminal actions as well. It followed that the syariah court had no jurisdiction to hear the matter. The applicant was unable to resort to the specific section in the Enactment to provide her with a remedy. (p 552 a-b)

Case(s) referred to:
Mohd Hanif Farikullah v. Bushra Chaudri & Another Appeal [2001] 2 CLJ 397 HC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 121(1A)
Islamic Family Law Enactment 1984 (Selangor), ss. 4, 24, 31(1), (2)

For the applicant - Yasmeen Hj Muhamad; M/s Mahani Hamid & Yasmeen
For the respondent - Sharuddin (Boestamam Ahmad); M/s Zulkifli Yong Azmi & Co

Reported by Usha Thiagarajah

JUDGMENT

Faiza Tamby Chik J:
Both the applicant and the respondent met in Austria while the applicant was on holiday. Parties were introduced by some friends and went through an Islamic marriage at the Islamic Centre St. Gallen Switzerland on 16 January 2000. They then registered their marriage in Austria on 24 February 2000 at the Civil Marriage Registry in Alberschewende, Austria (see copy of the Marriage Certificate marked and exhibited as 'NMH1' in the affidavit supporting the originating summons). The applicant then came back to

Malaysia to give the necessary notice to her employer and to arrange for her three children from a previous marriage to travel with her to Austria, where she agreed to set up her matrimonial home with the respondent. The happiness in this relationship did not last for long, as three days short of three months the parties were divorced due to differences that arose between them. On 25 May 2000 the applicant and the respondent went through a divorce at the Civil Court at Dornbirn, Austria (please see copy of the Divorce Decree marked as exh. 'NMH2' in the affidavit supporting the originating summons). It is interesting to note that the grounds put forward by the respondent for divorce were "the divorce is due to irreconcilable differences and that the two petitioners, although living in the same house, have not exercised marital relations for half a year". Also stated in the Divorce Decree is that "both petitioners agree to the divorce. Further there is already a written agreement over the divorce proceedings." Parties then agreed to a Syariah divorce by way of Khulu'. The respondent drafted and prepared the Khulu divorce agreement which is exhibited in the applicant's affidavit affirmed on 29 October 2003 and marked as exh. 'NMH1'. It must be noted here that while the applicant was married to the respondent and living in Austria, the applicant could not speak German, she only spoke English, as such the respondent drafted the divorce agreement and liased on her behalf with the authorities. When both the Civil and Syariah divorces were finalized the applicant left Austria with her children. It is noted that when the parties were divorced the applicant was about three months pregnant. She came back to Malaysia sometime in May 2000 and gave birth on 6 January 2001 to a baby girl named Nurul Iman, now 2 years 10 months old. Life went on as usual. The applicant after delivering her baby went on to seek employment and lived with her mother in Malaysia.

In September 2002 the respondent together with his new wife, Abida Begum (they got married after he divorced the applicant) came to Malaysia to see Nurul Iman. It is observed that the applicant was kind enough to put up both the respondent and his new wife and made Nurul Iman available to them daily. The respondent was in Kuala Lumpur, Malaysia for about two weeks. During this time the respondent and his wife hardly touched, fed, bath or played with Nurul Iman. After two uneventful weeks the respondent and his wife left for Austria. On 18 November 2002, the respondent appeared at the applicant's door, knocked and managed to get the door opened. At that time, only the applicant's children, nieces and nephews were at home. The respondent was known to the children as he had lived with the applicant's children and also had come down to Malaysia in September of the same year. I think he took advantage of the presence of the young people who were home alone, as the applicant was at work. The respondent

took the child who was only 1 year 10 months old, without the applicant's knowledge or her family's knowledge and left the country. It is noted that the baby, Nurul Iman was being breastfed by her mother at that material point of time. The applicant's young nieces and nephews could not do much to stop the respondent from taking and running away with the child. The applicant immediately upon being informed by her family members that the respondent had run off with the child in a waiting taxi lodged a police report on 18 November 2002. (The said police report is exhibited as 'NMH3' in the applicant's 1st affidavit (affidavit supporting the originating summons). The applicant also informed the Immigration Department of the incident, but it is seen that both the Police and Immigration Department were unable to act because the applicant did not have a Court Order showing that she had custody, care, control and or legal guardianship of Nurul Iman and also by that time the respondent had whisked Nurul Iman out of Malaysia with forged travel documents. The applicant later discovered that the respondent had left Malaysia with her little baby on flight MH 615 from Kuala Lumpur to Singapore on 18 November 2002 and thereafter to Zurich by Singapore Airlines Flight No. SQ 183 and arrived in Zurich on the morning of 19 November 2002.

The child Nurul Iman was born in Malaysia on 6th January 2001. Her birth was registered in Malaysia by her mother. She does not possess an international Malaysian passport. She has been issued a Malaysian birth certificate. The respondent ran off with the applicant's baby who was just 1 year and 10 months old, into a strange, cold and fierce climate – winter, which she was never used to or exposed to in her entire little life or to people she did not know or recognize, to food she was not familiar with, voices, sounds, noises alien to her – to a totally new environment. Fearing for the child's safety and well being in a strange new country, people and environment, the applicant turned to the Civil Court for legal guardianship. Since the marriage was registered and dissolved in Austria, the applicant did not think of registering her marriage or divorce for that matter in Malaysia as she did not foresee any problems. Parties led their own respective lives. The Applicant in Malaysia and the respondent in Austria. The respondent even went on to start a new life with his new wife. He married his second wife Abida Begum on 9 Jun 2001. It was only on 18 September 2002, that things took a turn, when the respondent kidnapped Nurul Iman and took her out of Malaysia. The applicant and her daughter were traumatized by the event that took place. Armed with an Order from the Malaysian Civil High Court dated 6 January 2003, the applicant managed to get assistance from the Respondent's home country government and her child was returned to the safety of her home country – Malaysia

some six months later. It is observed that the respondent choose to keep all this information away from this court and only chose to provide selective information to this court. The respondent also did not in his application filed with the Syariah Court on 31 July 2003 disclose, that there was an Order from the Civil High Court granting legal guardianship, custody, care and control of Nurul Iman to the applicant mother. It is also noted that the applicant is made to understand that the respondent has breached some laws in his home country (Austria) as exhibited in the applicant's 2nd affidavit affirmed on 29 October 2003 and marked as exh. 'NMH2', is a letter from the Public Prosecutor's Office, Basel City, Austria. Until 29 October 2003, the respondent has been hiring private investigators to follow the applicant around and on 29 October 2003, the respondent once again tried to take away Nurul Iman from her home, saying that the Civil Court order was invalid despite the fact that the respondent knew that his application to set aside the order obtained by the applicant on 6 Jun 2003 was fixed for hearing on 30 October 2003 (see the applicant's affidavit affirmed on 29 October 2003 – para. 23).

The issues raised by the respondent before this court are:

> Whether the Civil High Court has jurisdiction to hear the application for guardianship of the said child Nurul Iman, having regard to the fact that both parties profess the religion of Islam;

On the application of the applicant dated 6 January 2003, this court granted an order for the following prayers:

1. The applicant be granted legal guardianship, custody, care and control of the child named Nurul Iman binti Yusuf Maldoner;

2. The respondent returns the child known as Nurul Iman binti Yusuf Maldoner, who was taken out of Malaysia without the knowledge and consent of the applicant;

3. The cost of this summons to be borne by respondent.

I am of the opinion that the order issued by this court on 6 January 2003 is valid because that order is an order of a court of competent jurisdiction until and unless the order is set aside it remains. In the case of *Mohd. Hanif Farikullah v. Bushra Chaudri and Another Appeal* [2001] 2 CLJ 397, I held that "Article 121(1A) of the Federal Constitution does not overrule the general jurisdiction of the civil courts. Civil Courts are courts of general jurisdiction and can hear cases commenced by Muslims as well as by Non-Muslims, and can try offences against Muslims and Non-Muslims that are

created by the laws of the land. Moreover, the Civil High Courts are courts of inherent jurisdiction while the jurisdiction of the Syariah Courts are determined by the respective state laws and if the legislature does not confer on the Syariah Courts any jurisdiction to deal with any matter in the State List then the Syariah Court is precluded from dealing with that matter."

It is important to note here that, the respondent states that the marriage between the applicant and the respondent was contracted and solemnized in Austria at the Islamic Centre St. Gallen and later at the Civil Registry office of Alberschwende, Austria. The marriage was never registered in Malaysia. Parties had no intention of registering their marriage in Malaysia. Why was this so? I am made to understand that simply because the parties had no intention of setting up home in Malaysia. The parties had set up home in Austria. It was quite clear then that the parties had no intention of submitting themselves or their marriage to the jurisdiction of the Malaysian Syariah courts. That is why the parties to the marriage did not even make an attempt to register their marriage at a Malaysian Embassy, High Commission or Consulate. (See s. 24 of the 'Islamic Family Law Enactment 1984 (Selangor) (En. No. 4 of 1984) provides for the solemnization of marriage in Malaysian Embassies, High Commission or Consulate abroad). Therefore as the facts show s. 24 has no application in the instant case.

Pursuant to s. 31(1) of the Islamic Family Law Enactment 1984 (Selangor), if any person who is a resident of the State of Selangor has contracted a valid marriage according to Hukum Syara' outside Malaysia (not registered under s. 24) the person shall within six months after the date of marriage appear before the Registrar of Muslim Marriages, Divorce and Ruju' abroad to register the marriage. It is observed that in the instant case the parties did not register their marriage, within six months after the date of their marriage. Nor did the parties pursuant to s. 31(2) of the said Act before the expiry period of six months, upon their return of either or both parties and their marriage not being registered abroad, register the marriage within six months of their first arrival in the State of Selangor. The parties did come back to Malaysia within the first month of their marriage. The respondent in his affidavit affirmed on 12 September 2003 at para. 9 stated that the applicant after their marriage did come back and stayed in Malaysia for a period of one month from 26 February until 23 March 2000. To this the applicant responded in the affirmative, in para. 10 of her affidavit which she affirmed on 29 October 2003. The applicant stated that her reasons for returning to Malaysia was to give the necessary notices to her employer, as she was leaving her employment to start a new life in Austria, and to arrange for her three children from her previous marriage to travel with

her. She also stated in her affidavit that the respondent himself traveled to Malaysia to accompany her and her three children back to Austria. A very important question that arises here is that why did the parties not register their marriage in Malaysia at that point of time? The obvious answer is that the parties were not interested in registering their marriage because to them, for all intent and purposes their new home was in Austria and not in Malaysia. If the parties had intended to subject themselves to the laws of Malaysia especially the Syariah laws the parties would not have missed this golden opportunity to register their marriage when they returned to Malaysia one month after the marriage. The intention of the parties is clear and the court gave careful consideration to it. I think due weight must be given to the intention of the parties. For reasons best known to the respondent, the respondent has not exhibited a copy of the marriage certificate from the Islamic Centre St. Gallen, Switzerland. The court took note of the fact that the parties resided in Austria but solemnised their Islamic marriage in Switzerland and not in Austria.

Again when the applicant and the respondent went through a divorce in the Civil Court and through a 'Khulu' agreement on 21 May 2000, parties did not make an attempt to register the said divorce in Malaysia with the Syariah Court. Why? The answer is simple, the parties had no intention of being bound by the Syariah jurisdiction. The respondent, now cannot after getting married in February 2000 and thereafter going through a divorce in May 2000 and now in the year 2003, three years later, say that he is applying to have the marriage registered with the Syariah jurisdiction in Malaysia. I think the respondent should be estopped from doing so. The marriage is no longer subsisting, the divorce of the parties have taken the whole thing one step further away. There is no marriage to register as parties have gone through a divorce. I think the respondent's motive is clear, he wants custody of Nurul Iman. He took her by force since he did not succeed by using force he is now claiming that the marriage is valid and has been deemed registered.

Section 4 of the Islamic Family Law Enactment 1984 (En. No. 4 of 1984) reads:

> Save as is otherwise expressly provided this Enactment shall apply to all Muslims living in the State of Selangor and to all Muslims resident in the State of Selangor who are living outside the State of Selangor.

Section 4 clearly states that the Islamic Family Law Enactment of Selangor shall apply to all Muslims living in the State of Selangor. A practical question that arises here is "Does the respondent live in Selangor? The answer is No. From the above it is clear that s. 4 has no application to the respondent because he does not live in the State of Selangor. The second part of s. 4 goes on to read "and to all Muslims resident in the State of Selangor who are living outside the State of Selangor". Again it is clear that this section does not apply to the respondent because he is not a resident in the State of Selangor who is living outside the state of Selangor nor is he living in the state of Selangor. It is therefore clear from the foregoing that the respondent has no locus under the Selangor Islamic Family Law Enactment because he does not qualify under those Sections of the said Act as he is not living in the State of Selangor nor is he a resident in the State of Selangor who is living outside the State of Selangor. I come to the conclusion that s. 24 and conditions of s. 31 of the Enactment have not been satisfied because the Enactment has no application to the given facts. Section 31(2) provides for a situation where a person who is a resident of the State of Selangor contracts a marriage according to Hukum Syara' outside Malaysia. The said marriage does not come under the ambit of s. 24 as mentioned above, it is mandatory for the person after the date of the marriage, to appear before the nearest or most conveniently available Registrar of Muslim Marriage, Divorce and Ruju' abroad in order to register the marriage and the marriage, upon being registered shall be deemed to be registered under this Selangor Enactment. The respondent has stated that they were married on 16 February 2000 at the Islamic Centre St. Gallen, Switzerland. However the marriage certificate was never exhibited. As such I am unable to determine the structure and set up of the Islamic Centre St. Gallen, Switzerland. Is it merely a cultural centre where the Muslims get together for their activities and learning? No evidence has been put forward by the Respondent of the activities and the powers of this Islamic Centre St. Gallen, Switzerland. Section 31 states 'appear before the nearest or most conveniently available Registrar of Muslim Marriages, Divorce and Ruju' abroad in order to register the marriage'. No proof has been put forward by the respondent as to whether the Registrar of Muslim Marriages, Divorce and Ruju' exist at this Islamic Centre St. Gallen, Switzerland. In the circumstances the Court cannot take into consideration the registration if any of the marriage at the Islamic Centre St. Gallen, Switzerland and deem it as to be registered under the Selangor Family Enactment. The requirement of a Registrar of Muslim Marriage is not met here. The respondent further submits that the said marriage is deemed registered by virtue of the Civil Registration of the marriage at the Office of

Alberschwende, Austria. I think the respondent is clearly contradicting himself as on one hand he says that the Civil Courts and Civil Law has no jurisdiction on Muslims especially in this case. Yet on the other hand the respondent states that the registration of the civil marriage at the Civil Registry office of Alberschwende, Austria be deemed to be registered pursuant to s. 31 of the Islamic Family Enactment of Selangor. If this court holds that by registering the marriage with the Civil Registry office of Alberschwende, Austria the marriage is deemed to be registered under the Selangor Family Enactment, then the Applicant's submission that the Civil High Court of Malaysia has jurisdiction should stand. What is clear is that after their marriage in Austria, no steps were taken to register the marriage here.

What this court has to consider is whether Parliament intended to cause hardship to the applicant? In the given scenario, a young Malaysian woman is married and is divorced in a foreign country. The only thing left for the applicant is being a pregnant mother to three children from a previous marriage and have to come back home to Malaysia and safely deliver her child, and continue on with her life. But what happen? Suddenly out of the blue the baby she has carried for nine months and nurtured for 1 year 10 months is taken away from her forceably. She becomes desperate, her only one aim is to get her baby back to the safety of her warm arms and a familiar surrounding. She considers the fastest option open to her is an application by way of originating summons in the civil court. Why? Because she had no remedy in the Syariah Court for the following reasons:

1. Her marriage and divorce were never registered with the Syariah system and as such there was no remedy for her with the Syariah Court;

2. The Syariah Courts do not have inherent jurisdiction as the Civil Courts do;

3. Her former spouse the respondent is a foreigner and has taken her child out of the Malaysian jurisdiction;

4. Section 4 of the Selangor Family Enactment does not give locus to the respondent to appear before the Syariah Courts. The police, immigration authorities and the authorities in Austria requested a court order giving her guardianship before they would proceed to provide any assistance.

What was this helpless young mother to do? Go to Austria and fight the respondent in the civil courts there. That she could not do as she is an ordinary working mother with just about enough money to care for her children. What would have society had said about her if she did not react immediately? That she did not care for her young child. She was a no good mother. A child of that tender age of 1 year 10 months needed her mother's care, love and tender touch to reassure her. The best option she had before her was to make an application before the civil court. Her one intention was to bring back her child safely.

The effect of the amendment to art. 121 of the Federal Constitution is to avoid a conflict between the decisions of the Syariah Courts and the Civil Courts. But what is important and should be noted is each and every case is whether art. 121(1A) give exclusive jurisdiction. This issue of exclusive jurisdiction is explained in the case of *Mohd. Hanif Farikullah v. Bushra Chaudri & Another Appeal* [2001] 2 CLJ 397 at p. 407. In that case I discussed the State List as set out in the Ninth Schedule and came to the conclusion that "the State List as set out in the Ninth Schedule by itself does not automatically create and empower the Syariah Courts over matters contained in the State List unless and until the State Legislative has legislated and passed laws conferring jurisdiction over those matters to the Syariah Courts." It is observed here that while the legislature of a State has power to pass laws conferring jurisdiction over matters contained in the State list to the Syariah Courts, art. 121(1A) of the Federal Constitution gives only exclusive jurisdiction to the Syariah Courts in respect of any matter within the jurisdiction of the Syariah Courts. It can be seen here that art. 121(1A) does not overrule the general jurisdiction of the Civil Courts. The other point to remember is that the Syariah Courts do not provide for inherent jurisdiction, therefore the respondent is unable to turn to the Syariah Courts for a remedy.

It is interesting to note here that although s. 31 of the Islamic Family Enactment (Selangor) allows a person who is a resident in the State of Selangor, who has contracted a marriage outside the state in accordance with Hukum Syara' within six (6) months after the marriage to attend to register the marriage or in the alternative before the expiry of the six (6) months, one or both of the parties of the marriage returns to the state without registering the marriage in that county, any one or both of the parties shall attend before the registrar. The presumption that one can draw from s. 31, is that while a marriage is still subsisting parties are required to register the said marriage. In the instant case, the marriage was a short one, hardly lasting three months. The marriage was solemnized and dissolved

within a time frame of three months. The marriage at the material time was no longer subsisting. I think since the Syariah Courts do not provide for inherent jurisdiction, there was no specific section which the applicant could resort to in the Selangor Islamic Family Enactment to get the return of her child. In the instant case, the child Nurul Iman was taken out of Malaysia by the respondent. The issue is not merely one of custody or guardianship but may be one that hinges on criminal actions as well. Does the Syariah Court have jurisdiction to hear this matter? I do not think so. The applicant was unable to resort to specific section in the Enactment to provide her with a remedy.

For these reasons the respondent's application in encl. (6) is hereby dismissed with cost. The Order of the High Court dated 6 January 2003 should stand.